LIM KIM HONG & ORS. v. PUBLIC PROSECUTOR

[F.C. (Barakbah C.J. (Malaya), Wylie C.J. (Borneo) and Tan Ah Tah F.J.) July 13, 1965]

[K.L. — Federal Court Criminal Appeal No. 6 of 1965]

Internal Security — Consorting with persons carrying fire arms — Intention — Presumption — Reasonable doubt — Internal Security Act, 1960, s. 57.

The three appellants were convicted by the High Court on an amended second charge which read as follows: "That you about 6 p.m. on the 22nd day of August, 1964, in the security area as proclaimed by the Yang di-Pertuan Agong *vide* FLN 245 of 17th August, 1964, consorted with other persons who carried firearms in contravention of the provisions of section 57 of the Internal Security Act, 1960, in circumstances which raised a reasonable presumption that you intended to act in a manner prejudicial to public security and that you have thereby committed an offence punishable under section 58(1) of the said Act." The principal witness, in giving his account of the conversation which transpired between himself and a group of eleven men among whom were the appellants, stated *inter alia*: "They asked me to send them to Indonesia".

Held: the evidence given by the principal witness, which was to the effect that the group of eleven persons requested him to take them to Indonesia, must at the very least raise a reasonable doubt whether the appellants intended to act in a manner prejudicial to public security as is alleged in the amended second charge. The appeal was allowed and the convictions quashed and sentence set aside.

FEDERAL COURT.

T. T. Rajah for the appellants.

B. T. H. Lee (Deputy Public Prosecutor) for the respondent.

Tan Ah Tah F.J.: In this case each of the three appellants was charged in the High Court at Johore Bahru with two charges. The first charge was to the effect that between 7.30 a.m. on the 17th August 1964 and about 11.30 a.m. on the 23rd August 1964 in the security area known as Kampong Sungei Senai in the District of Pontian in the State of Johore, each of them had without lawful excuse under his control a firearm, which was specified in the charge, and that each of them thereby committed an offence punishable under section 57(1)(a) of the Internal Security Act, 1960. The second charge was to the effect that between 7.30 a.m. on the 17th August 1964 and about 11.30 a.m. on the 23rd August 1964 in the same security area, each of the appellants consorted with members of the Indonesian armed forces who carried firearms and ammunition in contravention of the provisions of section 57 of the Internal Security Act, 1960 in circumstances which raised a reasonable presumption that they intended to act with such members of the said Indonesian armed forces in a manner prejudicial to public security and that they thereby committed an offence punishable under section 58(1) of the said Act.

At the close of the case for the prosecution, the learned trial judge acquitted all three appellants on the first charge on the ground that no case had been made out against them which, if unrebutted, would warrant their conviction on that charge. As to the second charge, the learned judge found it necessary to amend it because the relevant events appeared to have occurred at about 6 p.m. on the 22nd August 1964 and also because there was no evidence to suggest that the persons with whom the three appellants were alleged to be consorting were members of the Indonesian armed forces. The second charge, as amended, reads as follows:—

> "That you about 6 p.m. on the 22nd day of August, 1964, in the security area as proclaimed by the Yang di-Pertuan Agong *vide* FLN 245 of 17th August, 1964 consorted with other persons who carried firearms in contravention of the provisions of section 57 of the Internal Security Act, 1960, in circumstances which raised a reasonable presumption that you intended to act in a manner prejudicial to public security and that you have thereby committed an offence punishable under section 58(1) of the said Act."

When the amended second charge was explained to the appellants, each of them claimed trial. After consultation with their counsel each of them elected to remain silent. Apart from a short cross-examination of one of the prosecution witnesses who was recalled for that purpose, no further evidence was given at the trial. After hearing counsel in the case, the learned judge convicted all three appellants on the amended second charge. As the second appellant was under seventeen years of age, he was ordered to be detained during the pleasure of the Ruler of the State. The first and third appellants were both sentenced to death. It is against the conviction on the amended second charge that this appeal is brought.

The principal witness for the prosecution was a fisherman called Abdul Jalil. He said that he had been out fishing with his son, a boy of about 14 years of age. They were returning home by motor-boat at about 5.45 p.m. on the 22nd August 1964 when they were stopped by two men. These two men held the motor-boat and nine other men came to join them. According to Abdul Jalil, this group consisting of eleven persons spoke to him. His account of the conversation and what transpired thereafter is as follows:—

> "They asked me to send them to Indonesia. I agreed. Told them I was an Indonesian myself. They were pleased. Told them we could not go then because of the curfew but that we could go the next day. They asked the end of the curfew period. Told them that curfew ended at 10 although I knew it would be lifted at 6 a.m. Told them we would proceed at 11 to Indonesia after getting food ready. They all agreed. We all returned home in our boat. My son was rowing. Reaching a hut which belonged to my father-in-law, I told them to disembark. I went to my house. Three persons followed me saying they wanted to have drinks. They followed me to the house. They helped themselves to the drinks which were there. Told them we would proceed at 11 next morning. Told them we would cook rice and then proceed to Indonesia. Three slept in my house. Eight slept in the hut."

Early the next morning Abdul Jalil left his house and reported the matter to the police. The security forces were duly informed and Abdul Jalil took them to his house. It is unnecessary for the purpose of this appeal to describe in detail what happened when the security forces approached the house. The three appellants were duly arrested and were identified by Abdul Jalil as being three of the group of eleven men whom he had encountered the previous evening. After some questioning, the Second Lieutenant who was in charge of the security forces was led to Abdul Jalil's boat where a number of firearms and some ammunition were found. These firearms and ammunition had been left in the boat by the group of eleven persons.

In our view the evidence given by Abdul Jalil to which we have referred and which was to the effect that the group of eleven persons requested him to take them to Indonesia must at the very least raise a reasonable doubt whether the appellants intended to act in a manner prejudicial to public security as is alleged in the amended second charge. It follows that in our judgment the appellants should have been acquitted.

Several other grounds of appeal were put forward by counsel for the appellants but in view of the conclusion which we have reached it is unnecessary to deal with them.

For the reasons which have been stated the appeal was allowed and the convictions quashed and sentence set aside.

Appeal allowed.

HALIJAH v. VELAITHAM

[O.C.J. (MacIntyre J.) December 15, 1965]

[Ipoh — Civil Suit No. 417 of 1963]

Negligence — Res ipsa loquitur — Inevitable accident — Volenti non fit injuria — Quantum of damages.

Damages — Fatal accident — Loss of expectation of life and pain and suffering.

The plaintiff claimed damages against the defendant for loss of expectation of life and loss to the estate arising from the death of her husband in consequence of injuries sustained when the car in which he was driven by the defendant crashed into a ravine. To prove negligence the plaintiff relied on *res ipsa loquitur*. The defendant denied negligence or that the deceased died of injuries sustained in the accident and averred that the accident was inevitable owing to the sudden puncture of a tyre. He also pleaded *volenti non fit injuria.*

Held: (1) on the facts it appeared that the car was being driven at an excessive speed and the accident was due to the failure of the defendant to exercise the duty of care which he owed his passengers, in that he was inattentive to the conditions on the road when he attempted to overtake a lorry;

(2) although the evidence showed that the defendant had consumed some beer before driving the car there was no evidence to show that he was not in a fit condition to drive the car and the plea of *volenti non fit injuria* must fail;

(3) the defendant was therefore liable in damages, which would be assessed at $3,000 for damages for loss of expectation of life and $4,500 for damages for pain and suffering.

Cases referred to:—

(1) *Lee Sai Cheong* v. *Wan Lim Cheong* [1962] M.L.J. 259.

(2) *Seow Seng Choon* v. *Yam Kim Chye & Anor.* [1952] M.L.J. 244.

(3) *Longhran* v. *Armstrong* [1956] M.L.J. 137.

(4) *Drennan* v. *Greer* [1957] M.L.J. 77.

(5) *Quek Poh Ser & Anor.* v. *Jhagir Singh* [1962] M.L.J. lxxxviii.

(6) *Wong Kuee* v. *Pahang Lin Siong Motor Co. Ltd.* [1962] M.L.J. lxxxiii.

CIVIL SUIT.

Ng Chee Kong for the plaintiff.

N. Sharma for the defendant.

Cur. Adv. Vult.

MacIntyre J.: This action is brought by the widow of one Mohamed Hussein bin Ahmad Tajuddin (deceased) claiming damages against the defendant for loss of expectation of life and loss to the estate arising from the death of the deceased aforesaid on the 14th of April 1963 in consequence of injuries sustained on the 16th day of July 1962 when the car in which he was driven by the defendant crashed into a ravine off Tambun Road, Ipoh. To prove negligence the plaintiff relies on *res ipsa loquitur.*

The defendant on the other hand denies negligence or that the deceased died of injuries sustained in the accident, and avers that the accident was inevitable owing to the sudden puncture of a tyre. He also pleads *volenti non fit injuria.*

It is clear from the evidence that the accident took place on the 17th of July 1962 and not on the 16th as pleaded by the plaintiff.

It would also appear from the evidence that at about 4.45 p.m. on the 17th day of July 1962 the deceased and one Syed Razali (P.W.3) decided to go with the defendant in his car on a spree. Their plan was to visit the military canteen at the Territorial Army Headquarters near Tambun Road and there to regale themselves with duty free beer. However, they did not reach their destination till 9 p.m. since in the meantime the deceased wanted to contact a friend. The unsuccessful quest took them first to a house in Lahat Lane, then to a place near Rex Theatre, and then to the Jubilee Park. From there they adjourned to a restaurant near Rex Theatre and finally to the army canteen.

At the canteen they met friends and were introduced to one Raja Aziz. The defendant,